IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1563

HERBERT BERNARD HENDERSON, M.D., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MISCELLANEOUS:

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The petitioner Herbert Bernard Henderson, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California or by the Court on the Petition for Rehearing.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 30, 1979. A timely petition for rehearing was denied on March 12, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 2101, 1254(1).

QUESTIONS PRESENTED

1. Whether the Court below was in conflict with other circuits in its determination of the sufficiency of evidence on the question of causing a mailing and if the Court's standard relieved the Government of proving each and every element beyond a reasonable doubt.

2. Whether the Court below denied to petitioner the right to call a material witness and punished the petitioner for the exercise of Fifth Amendment rights.

STATEMENT OF THE CASE

The defendant, HERBERT BERNARD HENDERSON, is a medical doctor who was indicted by a Grand Jury in the United States District Court for the Northern District of California, filed on November 8, 1975. Defendant was originally indicted on 17 counts of an alleged violation of Title 18, U.S.C., 1341 (use of the United States mails in a scheme to defraud) which said 17 counts, by the time of trial had on motions of the government been reduced to 9 counts on which the defendant went to trial. (C.R. 1; the counts were renumbered in the copy of the indictment as reflected by the court's interlineations). (C.R. denotes Clerk's Record; R.T. denotes Reporter's Transcript; and Ex. denotes exhibits). Defendant went to trial which commenced on October 17, 1977, before a jury in the courtroom of the Honorable Charles B. Renfrew, Trial Judge. (C.R. 140). The defendant was convicted on all 9 counts on

November 17, 1977. (C.R. 206). A motion for a new trial was argued and denied. (C.R. 392). Notice of appeal was timely filed on February 1, 1978 (C.R. 394). The Court of Appeals for the Ninth Circuit by Memorandum filed January 30, 1979 affirmed the petitioner's conviction. On February 9, 1979, the petitioner moved for a rehearing, which was denied on March 12, 1979.

ALLEGATIONS OF THE INDICTMENT

The indictment alleges that the defendant was a medical doctor who entered into a scheme with attorneys to provide inflated bills and medical reports showing a course of treatment for patients under treatment having been involved in automobile accidents, and which said treatment had not, in fact, been given; that said inflated medical bills and reports were for the purpose of getting settlements from insurance companies which would base the settlements upon the doctor's evaluation of the severity of the injuries as expressed in the inflated medical reports and bills. It was alleged that as a part of the scheme, the defendant employed the United States mails in the Northern District of California for the purpose of sending these medical bills and reports to insurance companies, and did knowingly cause the use of the United States mails by attorneys for the purpose of furthering the scheme to defraud. The indictment did *not* charge that the accidents in question were fake accidents, or that the patients were not, in fact, injured, but charged that the amount of the bills and the treatment given had been inflated by the defendant.

THE PROSECUTION CASE

The prosecution introduced the following evidence as to each count:

COUNT ONE: Ruth Birdie Johnson following an accident was treated by defendant, who referred the patient to Allen Jacobs, an attorney, to pursue her claim for injuries (R.T. 1246). Jacobs sent a medical report (Exhibit 1-B) and a medical Bill (Exhibit 1-C) to Murphy Cheatham, claims representative for State Farm Insurance Company. The report and bill were from defendant. The medical bill for Johnson was in the sum of $150 and, among other things, showed a nerve block and physiotherapy. Johnson was treated by other physicians as well, and the case was ultimately settled for $7,500. However, Cheatham indicated that he did not rely upon the defendant's medical bill, but excluded it from consideration in the settlement. (R.T. 1208). Cheatham testified that he received the bill and medical report from Jacobs by mail. (R.T. 1204). Johnson testified that she only went to see the defendant once, (R.T. 1248) and did not receive a nerve block or any physiotherapy (R.T. 1251).

COUNTS TWO AND THREE: William Murphy, a claims representative for State Farm Insurance Company for 14 years, (R.T. 1538), testified that he partially handled the injury claim of Emet Davis for about a month (R.T. 1540) and in connection with this claim, received from Allen Jacobs Dr. Henderson's medical report (Exhibit 6-C) and bill (Exhibit 6-D) which showed as part of the treatment a nerve block and several injections. On the matter of mailing, he testified that he had received these documents "in the mail" from Allen Jacobs (R.T. 1548). On cross-examination, however, he testified that he had not received the documents personally, but received from from the "mail room" (R.T. 1557). In answer to questions posed by the court, he indicated that the envelope had a cancelled stamp on it (R.T. 1558). The receipt of the medical bill and report is the gist of Count Two. Murphy did not settle the case, but referred it to another adjuster for settlement (R.T. 1553). Edward Teeling testified that he settled the Emet Davis case after Murphy could not get the medical report and bill, but that he subsequently got them from Allen Jacobs (R.T. 1560). He mailed the settlement draft to Jacobs and subsequently received a release back in the mail (R.T. 1566). The sending of the draft is the gist of Count Three. Davis testified that while being treated by the defendant, he never received a nerve block (R.T. 1592), and he never received the injections (R.T. 1595).

COUNT FOUR: Eric Jensen was a claims adjuster for California State Automobile Association, and handled the claims of Joyce English, Joyce Walker, George Walker, and Denise Bernard. He received Dr. Henderson's medical report (Ex. 8-B) and bill (Ex. 8-C) on Denise Bernard from Allen Jacobs (R.T. 1305). Denise Bernard testified that she did receive injections from the doctor and she did not remember how many visits that she made, but that the visits could have been more than 20. Since this testimony was contradictory to her Grand Jury testimony, the prosecution was allowed to impeach the witness by reading her Grand Jury testimony, in which she indicated that she did not receive a nerve block, received no injections, and went to the doctor no more than 4 or 5 times. (R.T. 1494-1536). On the matter of mailing, Jensen testified that he was sent the medical report and statement by Allen Jacobs by mail (R.T. 1305).

COUNTS FIVE AND SIX: Bessie Dean Tutt testified that she was claims representative for State Farm Insurance Company for 23 years (R.T. 900) and handled the claim of Alberta Jackson (R.T. 905), who was represented by Attorney Allen Jacobs (R.T. 907). She received from Jacobs Dr. Henderson's medical bill. (Ex. 23-D) and report (Ex. 23-C) on Jackson. On the issue of mailing, she testified that her company received these items from Jacobs by mail (R.T. 918). This was the gist of Count Five. She sent a draft and release to Jacobs by mail and got the release by mail. (R.T. 919). This is the gist of Count Six. Alberta Jackson testified that she did not receive certain treatment reflected on the bills (R.T. 956-960).

COUNTS SEVEN AND EIGHT: Isadore Gabriel Sanchez testified that he was a claims representative for State Farm for 20 years, and handled the claims of Georgia Everett, Marlon Washington, Earvin Fields, and Earnest Andrews. He received from Jacobs the defendant's reports and bills on each of the claimants. On the issue of mailing, Sanchez testified on direct examination that the medical reports and bills were "mailed to him" by Jacobs, (R.T. 1020); on cross-examination, he acknowledged that the medical reports and bills had been received by somebody else prior to his getting the file and that the file does not reflect who received them. In an effort to show mailing, he indicated that the documents were creased (R.T. 1052-1053) and finally admitted that he had no personal knowledge concerning mailing (R.T. 1053). The receipt of these reports and bills constituted the gist of Count Seven.

The case was assigned to another adjuster by the name of Vanderberg for settlement. Vanderberg testified that he received the case after somebody else had been handling it (R.T. 1075). He subsequently settled the case and mailed the draft and releases to Jacobs (R.T. 1079). This mailing constitutes the gist of Count Eight. Earnest Andrews testified that he did not receive certain treatment indicated on the bill (R.T. 1110). Georgia Everett testified that she did not receive certain treatment indicated on her bill (R.T. 1136-1149). Earvin Fields testified that he was treated by Dr. Henderson, but that he never received an injection as indicated on the bill (R.T. 1361).

COUNT NINE: Robert G. Sherman testified that he was a claims adjuster for California State Automobile Association and handled the claim of Florence and Mark Andrews. These claimants were represented by Allen Jacobs (R.T. 1725). Jacobs sent him medical reports and bills from the defendant (Ex. 41-C. D, E, F). On the matter of the mailing, he testified that he received the medical reports and bills through the "U.S. mail" (R.T. 1727). The case was never settled and there was nothing in the file to indicate that a lawsuit had been filed and the statute of limitations had run on the claim (R.T. 1734-1735). Florence Andrews testified that she and her son, Mark, did not receive certain treatment indicated on the bills (R.T. 1915-1917).

THE DEFENDANT'S CASE

The defense case consisted of evidence in support of the defense contentions that the medical reports and bills were not inflated and that the treatment reflected by the bills were, in fact, given. The defendant so testified in his own defense (R.T. 2497-2641). Other office personnel of defendant, principally Melvy Townsend, also so testified (Melvy Townsend R.T. 2175-2188, 2358-

2409). The defense also contended that the prosecution was racially inspired, but none of the evidence on either side of this issue is being set forth because it is not relevant to any points raised on appeal.

TESTIMONY ON THE ISSUE OF THE COURT DENYING TO DEFENDANT THE RIGHT TO CALL HIS LAWYER AS A WITNESS

Since the issue of use of defendant's lawyer as a witness is seriously raised by this Petition, the evidence bearing on that issue is set out below in some detail.

While the witness Emet Davis (Count Two) was on the stand, and under cross-examination by counsel for defendant, there was marked for identification what purported to be 3 prescription receipts (Ex. 11, 12, 13) in order to refresh the witness' recollection as to whether or not he had prescriptions filled which had been given to him by the defendant (R.T. 1638-1646). During the course of such examination, it was discovered that the purported receipts were irregular in that though they were for dates several days apart, two of them bore the same receipt number thereon. Following this discovery, the court ordered a hearing in the absence of the jury in order to determine the circumstances under which such purported receipts were created. During such session, the pharmacist, Simon Liebman, testified substantially as follows: that these receipts were recently made and resulted from a phone call asking for receipts for those particular dates in April, May and June (R.T. 1759); that the receipts were prepared at the request of someone from the defendant's office; that he did not check the underlying records to see whether or not a prescription was filled on those dates (R.T. 1751); that he had subsequently

checked his records and could find no record of prescriptions having been actually filled for Emet Davis (R.T. 1752-1753); that the person calling did not say why they needed the receipts (R.T. 1760); that he did not know the reason why the receipts were being requested so he made out three receipts as requested; that his receipts are in triplicate form and he merely took one form and made out a separate receipt on each of the three parts.

Walter R. Ems testified substantially as follows: that he was a pharmacist, also employed by the same drug company; that he received a telephone call from someone identifying himself as Dr. Henderson and indicated that he was sending someone over to pick up some receipts and that "there should also be some copies of the prescriptions (R.T. 1782); that he looked around and said "I see something here for Davis—three receipts" (R.T. 1970-1971); that the doctor then said, "that's what they are"; that he called to the attention of the doctor the fact that the receipts bore the year 1977, and the doctor said that this was an error and that it should be 1973, and for him to make the change (R.T. 1970); that he then wrote out three new receipts with the same dates and therefore ended up with six "receipts" (the other three receipts were given court's Exhibit No. 2, 3 and 4 for identification); that the defendant's daughter came in just before closing time and picked up the receipts; that she came back in and said that she had spoken with her mother and that she didn't think this is what was wanted; that he answered that he didn't know where Sam had looked up the records, and he couldn't give her any more information because he had no way of looking them up;

that she then left with the documents which he had previously given her.

Pamela Henderson Morgan was called as a witness by the court and testified substantially as follows: that she was the daughter of the defendant, and that she went to L & L Pharmacy with her mother to pick up some documents at the request of her father; that the pharmacist gave her three pieces of paper in one hand and three pieces of paper in the other and that she took them back to her mother who said, "I'm not sure this is what we want. Go back in and ask if there is anything else, any prescriptions, or something, or a record of it". (R.T. 1801). So she went back in and the druggist told her that he knew nothing about this because Mr. Liebman was not there. The next morning, as she was walking in the hall with her mother, she met Mr. Berman (counsel for the defendant), who was moving very fast into court, and she saw her mother give the documents to Mr. Berman and say "This is what the druggist gave us" (R.T. 1804). There was no opportunity to confer with Attorney Berman, who entered into court and immediately began to cross-examine the witness who was on the stand (R.T. 1804).

Clair Margaret Henderson testified substantially as follows: that she was the wife of the defendant and she was asked by her husband to go to the pharmacy to pick up some documents (R.T. 1810). She went to the pharmacy with her daughter who went in to get the documents. When her daughter came out she had some papers in her hand and she said to her daughter, "I don't think this is what was asked for because they don't look like they're verifications of a prescription, so go back in and ask them if we can have a copy" (R.T. 1817); that her daughter went back in, came back

out and said that Mr. Liebman was not there and he didn't know anything about it; that she then took the documents and went back to her home; that when she got home she showed them to her husband and said, "I don't know whether you can use these or not. I don't understand why they're written on all these pieces of paper"; that her husband said, "it doesn't matter what they're written on as long as they've been verified" (R.T. 1818); that the next day she took them to court and as she was going into court a few minutes before nine, Mr. Berman was rushing into the court; that she handed the documents to him and said, "Mr. Berman, these were some papers that were picked up last night. I think that they are dates that Mr. Davis may have had prescriptions filled" (T.R. 1819); that Mr. Berman took them in his hand and without any discussion, went in and started immediate cross-examination of the witness on the stand (R.T. 1819-1820).

The defendant testified substantially as follows: that he telephoned Mr. Liebman for vertification of prescriptions for Emet Davis because he knew prescriptions had been given (R.T. 1823); that he stated that he gave the pharmacist some target dates and asked him to give him verification of any prescriptions that were telephoned or written for Mr. Davis in 1973, on or about April 30, on or about May 14, and on or about the 1st day of June (R.T. 1825); that he stated that he told him to look for Empirin Compound, ½ gr. of Codiene (R.T. 1826); that Mr. Liebman said he would look up the request and try to have it for him; that he told him that it was important to have it, but he didn't tell him the reason (R.T. 1827); that later that day, he called back and talked to another gentleman who said said that Liebman had left something there and he told

them that his wife and daughter were on their way to pick it up (R.T. 1828); that when his wife returned that evening, they both noticed the sequence of numerals in the lower left-hand corner (R.T. 1831-1832); that he assumed that the documents were verification of prescriptions, so he told his wife to give these to Mr. Berman (R.T. 1832); that the next morning, he saw his wife give them to Mr. Berman as he was hurrying into court, but there was no time for any conversation and she just handed them to him and said, "Here's the material"; that he had no consultation with Mr. Berman before Berman started cross-examination of the witness (R.T. 1833) that he did not interrupt Mr. Berman while he was cross-examining the witness because he thought the receipts were verifications of actual prescriptions (R.T. 1834).

At the conclusion of the "chambers" hearing, the court, over the vigorous objection of defendant (R.T. 1851-1875), including a motion by defense counsel to be allowed to withdraw, allowed the issue of fabrication to go before the jury. Substantially, the same testimony was presented to the jury as was heard by the court in their absence.

REASON FOR GRANTING THE WRIT

I

The Court of Appeals Finding That the Evidence Was Sufficient as to Knowingly Causing the United States Mails' Utilization Is in Conflict With the Decisions of Other Circuits and a Mistake of Law and Fact by the Circuit Court.

In the instant case, the indictment alleged that the defendant participated in a scheme to defraud insurance companies by using the United States mails con-

trary to the provisions of 18 U.S.C., 1341. The statute in question provides, *inter alia:*

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice, or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or takes or receives therefrom, any such matter or thing, or *knowingly causes to be delivered by mail according to the direction thereon*. . . . . shall be [punished] . . ." (Id.; Emphasis added).

In this case, the government simply failed to adduce evidence which might properly be regarded as sufficient to establish defendant's liability for having" 'cause[d]' the mails' [utilization by performing] 'an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . . *Pereira* v. *United States,* 347 U.S. 1, 8-9, 74 S. Ct. 358, 363 . . . (1954)." *United States* v. *Maze,* 414 U.S. 395, 399, 94 S. Ct. 645, 648 (1974). For the prosecution failed to adduce any evidence which tended to suggest that the defendant himself utilized the mails in furtherance of the alleged scheme's consummation. Indeed, the government was unable to introduce any testimony tending to substantiate defendant's awareness concerning the mails utilization by his alleged accomplice, an attorney to whom defendant submitted the documents in question by means of a *messenger service* (R.T. 2376-2377). Moreover, the prosecution failed to adduce any evidence concerning the extent of commercial dependence upon the mails as a means of assisting the consummation of personal injury-related transactions between physicians, attorneys and insur-

ance companies. This is highly significant, since the government cannot establish the reasonable foreseeability of its mailing facility's utilization by the simple device of soliciting the invocation of judicial notice concerning the extent of commercial reliance upon this medium of communication. (*United States* v. *Dondich,* 506 F. 2d 1009 [9th Cir. 1974]; *United States* v. *Maze, supra,* 94 S. Ct. 650, fn. 7). Thus, the government's attempt to establish defendant's knowledge was entirely dependent upon the testimony of Isadore Sanchez—testimony to which defendant objected at trial. Insurance adjuster Sanchez provided an account documenting a series of 1960's negotiations with Dr. Henderson which had been directed toward the consummation of settlements in connection with several personal injury cases involving unrepresented patients. (R.T. 1033-1036). Sanchez, who stated that he was unable to recall the name of any such patient-claimant, acknowledged that his company's "general policy" involved the use of both personal contact and mailing as means of effecting settlement. (R.T. 1039). But since the witness was unable to offer testimony indicating the non-personal-contact character of any encounters with Dr. Henderson, it is readily apparent that Sanchez' account may properly be characterized as purely speculative in its tendency to establish the defendant's knowledge concerning the mails' probable utilization. Accordingly, it is clear that the prosecution failed to introduce any evidence tending to establish that Dr. Henderson might properly be charged with knowledge concerning the probability of mailings' utilization in furtherance of attempts to settle cases covered by the instant indictment. To reiterate, the government may not invoke the concept of judicial notice as a device by which to eliminate this evidentiary deficiency's fatal significance. By

itself, this deficiency mandates the reversal of defendant's conviction on all counts for want of sufficient evidence.

Secondly, the government failed to present evidence sufficient to establish the United States mails' actual utilization in connection with the settlement of cases covered by the instant indictment. In this case, as in *Dondich, supra,* (1010), not one witness acknowledged responsibility for having mailed any written communications. Not one witness claimed to have observed the commission of any act specifically or inferentially demonstrating the mails' prospective utilization. Moreover, the government failed to introduce a single postmarked envelope for the purpose of establishing the mails' employment in the instant case. But, as was observed in *Mackett* v. *United States,* 90 F.2d 462 (7th Circuit, 1937):

> "In *Brady* v. *United States* (C.C.A.), 24 F.(2d) 399, the sufficiency of the evidence on the element of mailing is discussed at length . . . The court, among other things, said: 'There is no direct evidence that defendants wrote the letters or that they deposited them in the post office directed to Mergen with postage prepaid, or that they otherwise caused them to be delivered to Mergen through the mails. *The envelopes in which the letters were mailed are not in the record and apparently were not introduced in evidence. . . . The fact that the defendants caused such letters to be delivered . . . must be inferred, if at all, from the fact that the letters purported to have been written either by McClintock or by Brady, and that the letters are addressed to Mergen . . . and that Mergen testified he received such letters through the mail'.*" (*Mackett, supra,* at 463).

Moreover, not one single witness provided competent testimony indicating personal knowledge concerning a

mailed communication's receipt. For instance, while Mr. Sanchez asserted on direct examination that medical records had been "mailed to him" by attorney Allen Jacobs, (R.T. 1020) the witness ultimately acknowledged a lack of personal knowledge with respect to the means by which Mr. Jacobs' documents had been transmitted. (R.T. 1053). Needless to say, the absence of tangible evidence tending to substantiate the validity of this witness' purported opinion hardly impairs its speculative character. As was observed in *United States* v. *Browne,* 225 F. 2d 751 (7th Cir. 1955):

> "There was no proof that the letter . . . was received by the witness or any other person connected with the insurance company in a stamped addressed envelope. (This is a circumstance if shown, much relied upon by some of the cases as creating an inference that the letter was received through the mails). It is true that Gadwell at one point testified that the letter was received through the mails, but it is conclusively demonstrated by his testimony that he had no knowledge that such was the fact and that his statement was nothing more than a matter of mere opinion. This is not sufficient." (Id.)

While he admitted that his files contained no information by recourse to which it might prove possible to identify the document's particular recipient, (R.T. 1052), Sanchez had initially observed that a "creasing" on the record's surface suggested their arrival in mailed envelopes. But since it is clear that circumstantial evidence indicating the utilization of envelopes cannot plausibly be regarded as sufficient to constitute circumstantial evidence that the containers in question had been transmitted by mail, the deficiencies which infect Sanchez' speculations are fully comparable to the

shortcomings with which the court was confronted in *Rosenberg* v. *United States,* 120 F. 2d 935 (10th Cir. 1941), wherein it was observed:

> "No envelope was offered. The government places strong reliance upon the letter from Uphoff to Harbor as indicating that the letter to the commissioner was sent by mail. But the letter to Harbor merely stated that a copy of a letter to the commissioner was enclosed. It did not even state that such a letter had been sent to the commissioner, much less that it had been sent by mail. . . . The mere fact that it was written in Illinois and reached New Mexico is not enough. . . . One of the accused may have delivered it in person, it may have been sent by messenger, or it could have been transmitted by express. Inference upon inference or presumption upon presumption was the only basis for the conclusion of the jury that the defendants caused the letter to be transmitted and delivered through the mails." (Id. 937).

And as was observed in *United States* v. *Baker,* 50 F. 2d 122 (2d Cir. 1931):

> "Nothing . . . was shown about [the letter in question] except that a former clerk in the addressee's office, who did not testify from any knowledge about the letter except his conclusion drawn from the addressee's stamp it bore, was asked 'In the ordinary course of your business would you say that that letter came through the mail?' and answered, 'Absolutely'.
>
> ". . . Since this letter went from New York to Hartford, it is very likely that it went by mail, as that is a convenient and customary way to send letters from one city to another. That is really all the 'proof' of mailing there is. If the guilt of an accused under the Mail Fraud Statute requires no more proof of the mailing of a letter than proof

that it was written in one city and received in another, the task of the federal prosecutor in such a case is much simpler than had been supposed, [citations omitted]." (Id. 123-124).

The only witness whose testimony is consistent with personal knowledge's existence is William Murphy, who claimed to have specifically noted the presence of a cancelled stamp on the face of an envelope which had been received from Mr. Jacobs in connection with settlement negotiations concerning a case the special significance of which remained unknown to the witness for a very substantial period of time (R.T. 1558).

Yet it is clear that both the remoteness and the apparent insignificance of the prior transactions justifies the propriety of characterizing this witness' scenario as inherently incredible—a characterization which nullifies this testimony's evidentiary significance. For as Justice Field observed in *Quock Ying* v. *United States,* 104 U.S. 417, 11 S. Ct. 733 (1891):

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits to many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard the evidence, *even in the absence of any direct conflicting testimony.*" (104 U.S. 420-421, 11 S. Ct. 734).

(See also, *Factor* v. *C.I.R.,* 281 F. 2d 100, 111 (9th Cir. 1960); *Wong Ken Foon* v. *Brownell,* 218 F. 2d 444, 446 (9th Cir. 1955). It is interesting to note that the doctrine of inherent incredibility has found expression in mail fraud cases involving problems similar to those presented by this witness' testimony. For as was recently stated in *United States* v. *Stull,* 521 F. 2d 687 (6th Cir. 1975):

> "No stamped envelope was introduced. Browne, supra, at 753, 756. The president-manager's testimony that he received the orders through the mail is no more than a conclusion, particularly in light of his admission that his secretary opened the mail, see *Mackett* v. *United States,* 90 F. 2d 462, 464 (7th Cir. 1937); *Baker, supra, Browne, supra,* at 756; and a rather weak conclusion at that, given the passage of four years between the receipt of these small, routine orders and his testimony. See [*United States* v.] *Ellicott,* 336 F. 2d 868, at 870 (4th Cir. 1964)." (*Stull, supra,* 690).

But since inherently incredible evidence is fully equivalent to its non-existence, the government failed to present evidence sufficient to establish the mails' utilization in connection with the settlement of cases covered by this case's indictment. For this reason alone, the instant conviction should be reversed as to all counts.

In sum, it is respectfully submitted that the prosecution failed to adduce evidence sufficient to justify the conclusion that defendant "knowingly [caused various documents] to be delivered by United States Mail [in furtherance of the instant alleged conspiracy]."

A principal point on appeal raised by the Appellant was the sufficiency of the evidence concerning "use of the mails." This Court, in rejecting Appellant's contention, stated in its opinion that "an examination of the record clearly discloses the direct testimony of at least one witness who stated that on each of the nine counts the mails of the United States were used for the purposes of transmitting or receiving letters, medical reports, medical bills, insurance drafts, or a release of claim relating to the plan to defraud." (Page 2 of the

memorandum, Lines 21-26.) The above statement of the Court is in error as a matter of fact. As to Count Seven of the Indictment, there was absolutely no evidence which could support a finding of "mailing" as it concerned this Count. The witness Sanchez did testify on direct examination that bills were "mailed to him" by Jacobs. However, on cross-examination, the witness acknowledged that the bills had been received by someone else prior to his getting the file and the file did not reflect how they were received. The witness finally admitted on cross-examination that he had no personal knowledge concerning mailing. (See Reporter's Transcript Page 1053, and Appellant's Opening Brief, Page 5. Lines 1-10. Therefore, at the very *least,* conviction on this Count should have been reversed.

Moreover, the Court, in finding that there was evidence of mailing on "each of the nine counts", has completely ignored the fact that all of the testimony from the witnesses on the remaining counts was conclusionary in form and said testimony does not rise to the dignity of amounting to proof beyond a reasonable doubt. On the facts of this case, the finding of "mailing" is in direct conflict with the specific holding of such cases as *United States* v. *Browne,* 225 F.2d 751 (7th Cir. 1955), *Rosenberg* v. *United States,* 120 F.2d 935 (10th Cir. 1941), *United States* v. *Baker,* 50 F.2d 122 (2nd Cir. 1931), and *United States* v. *Stull,* 521 F.2d 687 (6th Cir. 1975). The witnesses in the instant case testified to no more than the claim that they "received the letter through the mail." Stull specifically rejects this evidence as being merely conclusionary and insufficient to support a finding of a violation of the statute. *United States* v. *Stull,* 521 F.2d 687, 690.

II

The Trial Court Refused to Allow the Petitioner to Call as a Material Witness His Lawyer Who Could Give Exculpatory Evidence, And Punished the Petitioner for Exercising His Fifth Amendment Rights, And Misapplied the Law and Facts as to Federal Rules of Criminal Procedure 16(b), And the Court of Appeals Did the Same. The Decision Is in Conflict With the Law of This Court and With Other Circuits.

During the trial, defendant's attorney sought the issuance of an order authorizing his withdrawal by asserting that the emergence of a potential fabrication issue generated an attorney-client conflict and foreclosed his own capacity to provide exculpatory testimony concerning the circumstances surrounding appellant's purported attempts to fabricate evidence. (R.T. 1852-1873). The motion was ultimately denied (R.T. 1873). It has long been recognized that a "motion to dismiss counsel should be . . . granted where important interests of the defendant are at stake and there is no material danger that the processes of justice will be obstructed or abused." (*Dearinger* v. *United States,* 344 F. 2d 309, 311 [9th Cir. 1965]; see also, *United States* v. *Mitchell,* 138 F. 2d 831, [2d Cir. 1943]). While the fact that a defendant simply desires to obtain a delay in the proceedings obviously fails to qualify as a sufficient justification, (*United States* v. *Clausell,* 389 F. 2d 34, 35 [2d Cir. 1968]). it is clear that the "[d]enial of [a defendant's] motion [for withdrawal of counsel] is reversable error where there is some possibility that appellants have divergent interests so that one or both might not receive 'untrammelled and unimpaired' assistance from common counsel. (*Glasser* v. *United States,* 314 U.S. 60, 70, 62, S. Ct. 457 . . . [1942])." (*Glavin* v. *United States,* 396 F. 2d 725, 727 [9th Cir. 1968]). But since "'[i]t has been

widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice[,]" (*United States* v. *Alu,* 246 F. 2d 29, 33 [2d Cir. 1957]), there can be no question but that the denial of a withdrawal motion constitutes reversable error to the extent that it forecloses the elimination of a conflict between an attorney's respective obligations as advocate and percipient witness. For as was observed by one court:

> "[W]e deplore the practice of the government prosecutor so injecting himself into the trial of a case unless doing so is unavoidable. If it appears that he is to be a witness for the government, *and obviously there are times when that cannot be avoided,* the trial of the case should be entrusted to a colleague." (*United States* v. *Pepe,* 247 F. 2d 838, 844 [2d Cir. 1959]).

It is equally clear that the applicability of this proposition is not confined to prosecutors. For according to Disciplinary Rule 5-102 of Canon 5 of the Code of Professional Responsibility,

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial. . . ." (Id.)

(See *Kroungold* v. *Triester,* 521 F. 2d 763 [3d Cir. 1975]).

The substantiality of prosecutorial reliance upon fabrication evidence is clearly sufficient to outweigh the "reasonably anticipated delay or disruption of

court proceedings" attendant upon defense counsel's replacement. (*Dearinger, supra,* at 311). Yet the denial of defense counsel's motion for withdrawal foreclosed the presentation of exculpatory material evidence which would have assisted the jury's attempt to assess prosecution evidence purportedly establishing defendant's responsibility for having precipatated the manufacture of prescription receipts for presentation at trial. Moreover the significance of defense counsel's role in appellant's account concerning the circumstances surrounding these receipts' preparation might wall have induced the jury to invest his judicially-ordained non-witness status with substantial inculpatory significance.

Furthermore, the intensity of defense counsel's protestations of surprised non-involvement fully justifies the conclusion that his withdrawal motion was at least partially prompted by a belief that the receipts' presentation established a conflict between the vindication of his own professional status and the presentation of an effective defense on behalf of his client—a client whose actions may have been interpreted by defendant's trial counsel as having compromised the latter's integrity. Obviously, however, the existence of a conflict between attorney and client is fully comparable to either the existence of an opposition between counsel representative and testimonial obligations or the presence of adversity between the respective legal interests of co-defendants. For in each instance, the conflict situation diminishes the justifiability of a client's anticipation that he will obtain the benefit of "untrammelled and unimpaired" assistance from counsel. (*Glasser* v. *United States, supra*).

In view of the fact that this motion's denial not only prevented the introduction of substantial exculpatory evidence concerning fabrication but also invited the jury to regard the bare fact of defense counsel's non-witness status as an inculpatory circumstance, it is clear that the trial court's insistence upon the latter's retention simply augmented the prejudice to which appellant has been subjected in connection with this issue's presentation to the jury. The prejudicial implications inherent in this motion's denial are also highlighted by the issuance of an instruction which effectively encouraged the trier of fact to conduct its consideration of fabrication's significance in accordance with an assumption that its existence had already been conclusively demonstrated.

Subsequent to its compliance with defendant's request for discovery, the government obtained the issuance of an order mandating the production of Dr. Henderson's medical log and patients' records for prosecutorial inspection. The court ruled that defendant would be foreclosed from offering these logs and files in the event that he failed to comply with the reciprocal discovery order by invoking his Fifth Amendment privilege against self-incrimination. In response to defendant's contention that the discoverability of these documents presupposed his "inten[tion] to introduce [them] as evidence in chief at the trial", the court ruled that governmental representations concerning the anticipated contours of its witnesses' testimony were sufficient to justify a conclusion that the defense should be deemed to have foreseen the necessity of utilizing the documents in question for impeachment

and rebuttal purposes. Ultimately, the court permitted defendant to utilize his records for the purpose of unsuccessfully attempting to refresh a witness' recollection. Nevertheless, the court ruled that defendant's refusal to comply with its pretrial reciprocal discovery order foreclosed the documents' admissibility as substantive evidence under the past recollection recorded exception to the hearsay rule.

By predicating the admissibility of privileged information upon the renunciation of its protected status, the court violated defendant's Fifth Amendment privilege against self-incrimination. For as was observed by the Ninth Circuit Court of Appeals in *United States* v. *Brown,* 501 F. 2d 146 (9th Cir. 1974), reversed on other grounds in *United States* v. *Nobles,* 422 U.S. 225, 95 S. Ct. 2160 (1975):

> "The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e.g., *Sherbert* v. *Verner,* 374 U.S. 398, 403-406, 83 S. Ct. 1790, 1793-1795, ... To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a

penalty upon the exercise of that fundamental privilege." (501 F. 2d 152).

It is clear that the substantially unilateral quality of criminal discovery remains unimpaired by the Supreme Court's reversal of the Ninth Circuit's *Brown* decision. For as was stated in *Nobles, supra:*

> "The Court of Appeals concluded that the Fifth Amendment renders criminal discovery 'basically a one-way street.' 501 F. 2d at 154. Like many generalizations in constitutional law, this one is too broad. The relationship between the accused's Fifth Amendment rights and the prosecution's ability to discovery materials at trial, must be identified in a more discriminating manner.
>
> "The Fifth Amendment privilege against compulsory self-incrimination is an 'intimate and personal one', which protects 'a private inner sanctum of individual feeling and thoughts and proscribes state intrusion to extract self-condemnation.' *Couch* v. *United States,* 409 U.S. 322, 327, 93 S. Ct. 611, 615 . . . (1973) . . . As we noted in *Couch,* 409 U.S., at 328, 93 S. Ct., at 616, the 'privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him.'
>
> "In this instance disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.
>
> "We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. The Court of Appeals' reliance on this constitutional guarantee as a bar to the disclosure here ordered was misplaced." (95 S. Ct. 2167-2168).

In contrast to the situation with which the Supreme Court was confronted in *Nobles, supra,* the instant case involves documents the preparation of which is directly attributable either to the defendant himself or an agent acting under this direct supervision. The present case thus stands in sharp contrast with the circumstances presented by *Fisher* v. *United States,* 96 S. Ct. 1569 (1976), wherein the Supreme Court observed:

> "A subpoena served on a taxpayer requiring him to produce an accountant's work papers in his possession without a doubt involves a substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. [Citations omitted]. The accountant's work papers are not the taxpayer's. They were not prepared by him,

and they contain no testimonial declarations by him. . . ." (96 S. Ct. 1580).

There can thus be no question but that the Fifth Amendment privilege's applicability is sufficient to substantially undercut the reciprocity of criminal discovery which is permitted by Rule 16. As was observed in *United States* v. *Fratello,* 44 F.R.D. 444 (S.D. N.Y. 1968), (a decision which the Ninth Circuit's *Brown* opinion cited with approval, [501 F. 2d 154]):

> "It is true that discovery under Rule 16(b) is limited to material as to which the defendant intends at the trial, to waive his Fifth Amendment privilege. . . ." (*Fratello, supra,* at 448).

The Advisory Committee note accompanying Rule 16(b) provides the following guidance for the exercise of discretion:

> "While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. . . . [Where] the defendant is well represented and well financed, mutual disclosure *so far as consistent with the privilege against self-incrimination* would seem as appropriate as in civil cases." (*8 Moore's Federal Practice,* § 16.01[3] (1967).

The *Nobles* decision has not impaired the efficacy of this Circuit's endorsement of a doctrine advanced by the California Supreme Court in accordance with which the prosecution is foreclosed from attempting to circumvent an assertion of the Fifth Amendment privilege by the simple devise of demonstrating that "the defendant intends to introduce [the materials in question] as evidence in chief at the trial". Rule 16[b]).

For as the Ninth Circuit observed in *United States* v. *Brown, supra:*

> "In *Prudhomme* v. *Superior Court,* 2 Cal. 3d 320, ... (1970), the court wrote:
>
> ' . . . . .
>
> 'The People must "shoulder the entire load" of their burden of proof in their *case in chief* without assistance from the defendant's silence or from his compelled testimony. [Citations].'
>
> 'Thus, . . . it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense" or *whether defendant intends to introduce or rely upon the evidence at trial,* but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its *case in chief.* Although the defendant should not be completely barred from *pretrial* [emphasis in original] discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.'. . . .
>
> [2 Cal. 34] 323-325, 326 . . . ." (501 F. 2d 153-154).

It is thus readily apparent that the privilege's efficacy as a means by which to resist an order of reciprocal discovery cannot be made to depend upon the question of whether or not the "defendant intends to introduce [the materials] as evidence in chief at the trial." (Rule 16[b]). Of course, it need hardly be mentioned that the privilege's applicability does not presuppose the asserting party's capacity to demonstrate the existence of tangible hazards of incrimination. As the Ninth Circuit observed in *Brown, supra:*

"In *Prudhomme* v. *Superior Court,* 2 Cal. 3d 320, ... (1970), the [California Supreme Court] wrote:

> 'An ordinary witness need not actually prove the existence of an incriminatory hazard, as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, ... the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have the tendency to incriminate the witness'." (501 F. 2d 153-154).

In sum, the sanctions to which the defendant was subjected by virtue of his non-compliance with the instant discovery order contravened his capacity to assert a Fifth Amendment privilege against compulsory self-incrimination.[1]

Even if the foregoing constitutional problems are ignored for the sake of discussion, however, it seems clear that the materials in question may not properly be characterized as "relevant" within the meaning of Rule 16. For the relevancy of potentially discoverable material is dependent upon the extent to which the scope of its anticipated utilization excludes the purposes of impeachment and rebuttal as justifications for its introduction. As we observed in *United States* v. *Skillman,* 442 F. 2d 542 (8th Cir. 1971):

> . . . . The recorded conversation was not a 'relevant statement' under the meaning of Rule 16. It was introduced not as a part of the government's case-in-chief, but on rebuttal. . . . It was not admitted for its truth, but was admitted solely for the purpose of impeaching Skillman's denial that he had ever talked with Knight." (Id. 550).

[1] Moreover, the sanction of exclusion effectively penalized the defendant for attempting to protect himself against the possibility of administrative liability in connection with the disclosure of materials protected by the patient-physician privilege.

Moreover, the prosecution cannot compel the defense to anticipate the necessity of impeaching government witnesses by the simple device of asserting the predicatability of their testimony. For as the Supreme Court observed in *Jencks* v. *United States,* 353 U.S. 657, 77 S. Ct. 1007 (1957):

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. *The occasion for determining a conflict cannot arise until after the witness has testified* and unless he admits conflict, ... the accused is helpless to know or discover conflict without inspecting the reports." (353 U.S., 667-668, 77 S. Ct. 1013; Emphasis added).

Thus, it seems clear that the materials in question cannot properly be characterized as comprising "books, papers, [and] documents . . . . which the defendant intends to introduce as evidence in chief at the trial." (Rule 16(b), *Federal Rules of Criminal Procedure*).

Finally, the instant order sweeps with unnecessary breadth in purporting to compel the disclosure of all patients' records and physician's log books. In *United States* v. *Wright,* 480 F. 2d 1181 (D.C. Cir. 1973), the court discussed a similar situation in the following terms:

> " . . . . [T]he investigative report obtained from Reeves included not only a summary of Reeves' interview with Richardson, but also summaries of his interviews with other potential witnesses, including Miss Fleming, who Holloway testified ac-

companied Holloway and appellant as they drove around DuPont Circle about the time of the robbery.

". . . .

". . . . [T]he rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters—his interview with Richardson on January 19, and his examination of the lighting conditions at the scene of the crime. Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative to this testimony and possible use to the government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution. But there was nothing in the investigative report on Reeves' examination of the lighting conditions. And the report contained much information totally irrelevant to the January 19 interview with Richardson, including summaries of interviews with police officers, another interview with Richardson, and the interview with Miss Fleming. Even if Reeves used the report to refresh his recollection, only those parts of the report relating to his testimony on direct need have been turned over to the government. [Citations omitted]." (*Wright, supra,* 185, 1189).

In the instant case, defendant unequivocally represented his intention to confine the utilization of his records to the limited rebuttal purpose of impeaching prosecution witnesses in the event of any misrepresentations concerning the extent of treatments with which they had been provided by his office. Consequently, the reciprocal discovery order's sweeping scope substantially exceeded the dimensions of its issu-

ance's initial justification. The circumstances of the instant case thus stand in sharp contrast with the facts confronting the Supreme Court in *Nobles, supra,* wherein it was observed:

> "Finally, our examination of the record persuades us that the District Court properly exercised its discretion in this instance. The court authorized no general 'fishing expedition' into the defense files or indeed even into the defense investigator's report. Cf. *United States* v. *Wright, supra.* Rather, its considered ruling was quite limited in scope, opening to prosecution scrutiny only the portion of the report that related to the testimony the investigator would offer to discredit the witness' identification testimony. The court further afforded respondent the maximum opportunity to assist in avoiding unwarranted disclosure or to exercise an informed choice to call for the investigator's testimony and thereby open his reports to examination." (95 S. Ct. 2171).

Obviously, however, the court's decision to prevent the introduction of Dr. Henderson's records effectively penalized the defendant for having refused to comply with an overly broad discovery order.

It is clear that the imposition of sanctions as the price for defendant's non-compliance with the reciprocal discovery order effectively prejudiced Dr. Henderson's right to a fair trial. During Grand Jury proceedings, the prosecution obtained testimony by several former patients tending to suggest that the defendant had substantially exaggerated the extent of their respective treatments for the purpose of defrauding insurance carriers in connection with numerous personal injury automobile accident cases. However, some of these witnesses subsequently repudiated their Grand Jury testimony at the time of trial. In each such in-

stance, the trial court admitted the declarant's former testimony for substantive purposes pursuant to the hearsay rule's prior inconsistent statement exception. The jury was thus confronted with the difficult task of attempting to effect a selection between mutually exclusive accounts of the witnesses' respective relationships with their physician. It is only too obvious that the defendant would have been able to assist the jury's completion of this conflict-resolution process in the event he had been permitted to introduce his medical logs and patients' files for the purpose of impeaching misrepresentative statements. Clearly, therefore, the invocation of sanctions as a consequence of defendant's non-compliance with the order for reciprocal discovery severely prejudiced Dr. Handerson's capacity to obtain a fair trial.

In rejecting Appellant's Fifth Amendment claim in connection with the Order for Reciprocal Discovery pursuant to Rule 16(b), this Court seriously misconceived the facts, and thereby misapplied the law. In its Memorandum Decision, the Court stated at Page 5, Lines 24-28, that Defendant's Trial Counsel "advised the Court that he intended to use the medical records during the presentation of his case in chief." This statement is in most serious error. Never at any time did the Defense Counsel advise the Court that he intended to use the records in his "case in chief." On the contrary, counsel repeatedly reiterated that he had *no intention* of introducing the documents in his case in chief, *unless* they were used for impeachment purposes, and impeachment material was not required to be produced pursuant to Rule 16(b). The hearing on the Motion for Reciprocal Discovery appears in the Reporter's Transcript, Page 192 through 217. Within

those pages appears such comments from Defense Counsel as:

> "I have never indicated to Counsel in any way, shape, or form that we were going to introduce records," (Page 193, Lines 3-5), and the comment by the Court as follows:
>
> The Court: ". . . my understanding was: Counsel has said he does not intend to offer any of these documents in evidence, at all."

Again, at Page 214, Line 14, Mr. Berman (Defense Counsel) stated, "We will not offer those in chief." The record is clear that Defense Counsel's position was that the records would only be introduced for impeachment purposes, in event the prosecution witnesses did not testify truthfully, and pointed out that impeachment material did not come within the confines of Rule 16(b).

The Court accepted the defendant's position that he did not intend to introduce the documents in his "case in chief" but when counsel indicated that he may possibly use the documents for impeachment purposes, and that he would have to make that decision when the issue arose, thereupon, the Court indicated that the defendant would not be allowed to utilize the documents *for any purpose* if defendant could not state at that point in time whether or not he was going to introduce the documents. (See Page 215, Line 1 through Page 216, Line 4.) It was only after the Court had taken this position that the defendant then asserted a refusal to show the documents on the ground of a Fifth Amendment privilege. The Court, having recognized and accepted defendant's position that he had no present intention of introducing the documents, nevertheless pen-

alized the defendant by making an Order which prohibited the defendant from introducing the documents at any time for any purpose in spite of the fact that he claimed a Fifth Amendment privilege.

Perhaps the Court's misconception of the facts led it to a serious mistake in the application of the law, since Rule 16(b) has no application to the requirement of reciprocal discovery *unless* the defendant intended to introduce the documents in his case in chief, and the record is abundantly clear that there was no such intention on the part of the defendant. Therefore, this Court's opinion concerning "acceleration of the moment of disclosure" has no application to the case before it. Indeed, this Court stated that the Trial Court had accepted the defendant's position that inasmuch as he did not intend to introduce the documents in his "case in chief" the documents did not fall within the Rule 16(b) requirement. (Memorandum Opinion, Page 6, Lines 9-14) Once the Court accepted the defendant's position that he did not intend to offer the documents in his case in chief, the reciprocal discovery Order was no longer valid.

It is clear from the record that the documents in question did pose a properly invoked Fifth Amendment privilege. Because the defendant subsequently decided to waive that privilege, and to utilize the documents to either refresh the recollection of defense witnesses, or to utilize them in establishing past recollection recorded, the Trial Court had absolutely no right to prevent the use of the questioned material because to do so was to punish the defendant for the invocation of Fifth Amendment privileges, which said privileges could be waived at any time by defendant.

Contrary to the instant Memorandum Opinion, neither *Williams* v. *Florida,* 399 U.S. 78, nor *United States* v. *Nobles,* 422 U.S. 225, supported the Government's position. The Williams opinion was inapplicable since that case involved a Notice of Alibi statute rather than a Reciprocal Discovery provision. More significantly, Nobles provides a strong indication that a Fifth Amendment claim may not be defeated so long as the materials called for under a Reciprocal Discovery Order do not fall within what "the defense intends to reveal at trial." (*United States* v. *Browne,* 501 F.2d 146, 154, 9th Cir. 1974) While Nobles in effect reversed Browne, it did not reverse the logic and holding of the language set forth above.

In summary on this point, it is asserted that the Trial Court, while accepting defendant's position that the records did not fall within the Rule 16 requirement because they were not items which he intended to introduce in his case in chief, said Trial Court nevertheless refused to allow the introduction of the documents in question because the defendant had failed to comply with an Order which could not, under the law, be made. This Court's affirmance of the Trial Court's position has denied the defendant a most basic constitutional privilege, which denied him due process in that all parties recognized that at the point in time when the records were sought to be introduced, they constituted a most significant facet of the defense case since those records would have impeached the voracity of the prosecution witnesses who testified to facts contrary to those contained in the records.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-1344

Memorandum

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

v.

HERBERT BERNARD HENDERSON, M.D., *Defendant/Appellant.*

Appeal from the United States District Court for the Northern District of California

Before: DUNIWAY and KILKENNY, Circuit Judges, and McGovern*, District Judge.

Defendant appeals from the judgment and sentence entered by the Court upon a jury verdict finding defendant guilty on 9 counts of using the mails of the United States to defraud in violation of Title 18 U.S.C. § 1341.

The basic facts giving rise to the charges were said to be that the defendant doctor of medicine knowingly made false statements by overstating the severity of injuries, and the quantity of treatment rendered, to some of his medical patients; that the magnified claims were then processed through attorney at law, Allen Jacobs, who forwarded them to certain insurance companies for claim settlement purposes; and that defendant knowingly caused the United States Mail to be used in furtherance of the scheme to obtain money from those insurance companies by means of those false and fraudulent representations.

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* Honorable Walter T. McGovern, Chief United States District Judge, Western District of Washington, sitting by designation.

Defendant contends that the government failed ". . . to adduce any evidence which tended to suggest that the defendant himself utilized the mails in furtherance of the alleged scheme's consummation." He argues that he himself employed a messenger service for the delivery of documents to the lawyer and that there was no evidence to support the proposition that he was aware of lawyer Jacobs using the mails to promote the fraudulent scheme.

It is, of course, not necessary for the government to show that the defendant actually mailed any of the documents himself. Nor is it necessary that the plan or scheme envisage the use of the mails as a part of the plan or scheme. The essential elements are: (1) the scheme to defraud and (2) the use of the mails for the purpose of carrying out the scheme. And the second element is satisfied if the defendant merely "caused" a mailing to be made. *Pereira v. United States,* 347 U.S. 1 (1954); *United States v. Outpost Development Co.,* 552 F.2d 868 (9th Cir. 1977).

Did defendant here cause the mailing? "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira v. United States, supra,* at 8-9.

An examination of the record clearly discloses the direct tesitmony of at least one witness who stated that on each of the nine counts the mails of the United States were used for the purposes of transmitting or receiving letters, medical reports, medical bills, insurance drafts, or a release of claim relating to the plan to defraud. The jury was correctly instructed on this essential element of the charge and apparently was satisfied that the mails were in fact used and that such use by a participant, or somebody else, was either reasonably foreseeable by the defendant or authorized by him, or chargeable in law, to him. Ample evidence in the record supports that finding.

Defendant next complains of the court's instruction on the issue of fabrication of defense, i.e., the use of Devitt and Blackmar, *Federal Jury Practice and Instructions* § 15.09 (3d ed. 1977).

While it may be said that the instruction would be better stated if it contained the usual conditional language to the effect that evidence of fabrication could be considered in the case *if the jury finds that there was such as attempt to fabricate,* nonetheless an examination of the record as a whole indicates no plain error in this respect, but, if error at all, then harmless in law.

No exception was taken to the instruction as proposed and given; no argument was made or inferred by the government that the court had in fact found an attempted fabrication by the defendant; counsel for the government and counsel for the defense each argued to the jury the question of whether an attempt to fabricate the evidence had been made; the court instructed the jury that no one instruction should be considered in isolation but that the instructions should be considered as a whole and the jurors were instructed that they were the sole judges of the weight and effect to be given to any and all evidence admitted in the cause. The assignment of error is without merit.

Defendant next assigns error to the failure of the trial court to grant defense counsel's motion to withdraw as attorney for the defendant when the issue of fabrication of evidence arose.

Toward the close of the government's case in chief the court held a hearing outside the presence of the jury to determine whether sufficient cause existed to justify a presentation of facts to the jury on the question of fabrication of evidence. Following the ruling that the issue would be presented to the jury, defense counsel predicated his motion to withdraw upon the belief that his credibility with the jury had been impeached because it was he who first raised the issue of contradictory evidence. The court considered

the interests of all parties involved and then denied the motion to withdraw. ". . . a motion to dismiss [defense] counsel should be denied if defendant's reasons are insubstantial in relation to reasonably anticipated delay or disruption of court proceedings; and, conversely, such a motion should be granted where important interests of the defendant are at stake and there is no material danger that the processes of justice will be obstructed or abused." *Dearinger v. United States,* 344 F.2d 309, 311 (9th Cir. 1965).

The trial court pointed out to defense counsel that his integrity was not impugned in that appellant's wife testified that she gave the documents in issue to defense counsel for the first time as he entered court that morning. Additionally, defense counsel was allowed to cross-examine the principal witness upon the theory of a misunderstanding, as distinguished from fabrication, of evidence.

Those factors, in conjunction with the fact that this was the third trial of the cause, that the appellant was in a state of ill health, that a mistrial would seriously inconvenience the witnesses, and that the government's case in chief was substantially completed, all support the discretionary ruling of the trial court. No error occurred.

Defendant next contends that the court committed error when it prohibited him from placing into evidence certain records of his medical patients.

Pre-trial motions had resulted in an agreed upon order of reciprocal discovery under Federal Rules of Criminal Procedure, § 16(a) and (b). Yet defendant thereafter advised the court that he would not comply with its order because such order violated his fifth amendment privilege against self-incrimination.

Notable jurists and authors have made a similar argument. See the dissent of Douglas, J. from the adoption of Rule 16, Federal Rules of Criminal Procedure, at 39 F.R.D. 276, 277 and Wright, *Federal Practice and Procedure:*

Criminal, § 256. The arguments put forward by those authorities have been substantially watered down in effect, however, when considered in the light of *United States v. Nobles,* 422 U.S. 225, 95 S. Ct. 2160 (1975), which sustains the government's limited right to reciprocal pre-trial discovery in criminal cases, and in the light of *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893 (1970).

In *Williams* the court upheld a Florida state statute which required a defendant to give notice to the state if defendant intended to rely on an alibi defense and to then furnish the state with a list of names of his alibi witnesses. The state was then reciprocally required to produce for the defendant its list of alibi rebuttal witnesses. That court said:

> "Nothing in the Fifth Amendment privilege entitles a defendant as a mater of constitutional right to await the end of the state's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the state's case-in-chief before deciding whether or not to take the stand himself." 39 U.S. 78, at 85.

In the case at hand, defendant's trial counsel at the time of the trial court's initial consideration of the issue in dispute advised the court that he intended to use the medical records during the presentation of his case in chief. The only condition then attached to that admission was the claim of a doctor-client privilege, subsequently admitted by defense counsel to be without merit, and not raised on appeal, and the later argument of irrelevancy.

Considered in the light of defendant's then claim that he intended to use the questioned exhibits during his case in chief, it appears that no substantial risk, or the exposure to danger, of self-incrimination existed to possibly incriminate the defendant by an acceleration of the moment of disclosure of those exhibits.

Later, upon plaintiff's renewed request for an order requiring the defendant to deliver to plaintiff copies of those rule 16 reciprocal documents, the defendant aruged to the court that he no longer intended to introduce those exhibits into evidence during his case in chief and that, therefore, they did not fall within the rule 16 requirement. The trial court accepted that argument and did not require their production. The court did, however, advise defense counsel that it would not tolerate an attempt by the defense to avoid the reciprocal discovery order and would not permit the admission of the documents in issue into evidence during defendant's case in chief without prior disclosure to the government. That order, and that admonition, were consistent with the court's prior rulings on the issue and, under the facts at hand, were correct in law.

Considering the wide latitude necessarily granted trial judges when dealing with the questions of relevancy of evidence and considering the breadth of the reciprocal rule 16 order, defendant's declarations of error as they relate to those subjects are without merit.

Defendant sets forth two remaining assignments of error. He first claims reversible error because of a prosecutorial comment made during closing argument about the failure of defendant to produce certain evidence within the defendant's possession. No objection was made to the statement at the time it was made and the failure of the trial court to *sua sponte* strike the statement did not constitute plain error, if error at all.

Finally, it is alleged that certain improper re-direct examination of prosecution witnesses was permitted. The record shows that such re-direct questioning on that subject was occasioned by the defendant's cross examination of those witnesses. The claimed error is without merit.

AFFIRMED.